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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

OUR FILE NO.
0080-108-63

January 22, 1996

DOCKET FILE COPY ORIGINAL

**Mr. William Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554**

**Re: CS Docket No. 95-178
Definition of Markets for Purposes of the Cable
Television Mandatory Television Broadcast
Signal Carriage Rules**

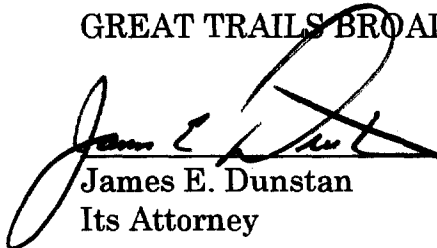
Dear Mr. Caton:

Submitted on behalf of Great Trails Broadcasting Corp., are an original and nine copies of their "ERRATUM," being filed in the above-referenced proceeding.

If there are any questions concerning this matter, please communicate directly with this office.

Respectfully submitted,

GREAT TRAILS BROADCASTING CORP.


James E. Dunstan
Its Attorney

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Before The
Federal Communications Commission
Washington, D.C. 20554

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In The Matter Of)

Definition of Markets for Purposes of The)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

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To: The Commission

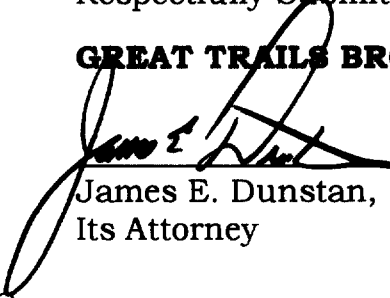
ERRATUM

Great Trails Broadcasting Corp. ("Great Trails"), by its attorneys, hereby files this Erratum to the Comments it filed in the above-referenced proceeding on January 19, 1996.

In the caption of its Comments, undersigned counsel inadvertently listed the FCC Document Number of the *Notice of Proposed Rule Making* (95-489) as the Docket Number. A copy of those original Comments is attached hereto, with the Docket Number corrected. No other changes to the Comments have been made.

Respectfully Submitted,

GREAT TRAILS BROADCASTING CORP.


James E. Dunstan,
Its Attorney

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Definition of Markets for Purposes of The) CS Docket No. 95-178
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To: The Commission

**COMMENTS OF
GREAT TRAILS BROADCASTING CORP.**

Great Trails Broadcasting Corp. ("Great Trails"), by its attorneys, hereby files these Comments in response to the Commission's *Notice of Proposed Rule Making (NPRM)* in the above-referenced proceeding. In support of its Comments, Great Trails submits:

I. SUMMARY

Great Trails' WHAG-TV would be impacted by any change in the definition of its must-carry zone for two reasons: 1) while it had its own ADI, there is no Hagerstown DMA, and 2) the Commission previously had expanded its must-carry zone to include additional counties based on the four-prong test of Section 614(h). Great Trails urges the Commission to proceed carefully in this matter and to adopt the following policies:

1) Continue to recognize as valid the must-carry zones adjudicated pursuant to the Section 614(h) petition for special relief mechanism;

2) Continue to recognize the "closest affiliate" rule to ensure that suburban stations are carried when they are closer to cable headends than more distant, but larger stations; and

3) Use the existing ADI definitions of must-carry zones for the next three year cycle, and then adopt Nielsen DMAs beginning in the year 2000.

II. INTRODUCTION

Great Trails is the licensee of two television stations, WHAG-TV, Channel 25, Hagerstown, Maryland, and WFFT-TV, Channel 55, Fort Wayne, Indiana. WHAG-TV is an NBC affiliate, while WFFT-TV is affiliated with the Fox Network. Great Trails is especially concerned about the impact a rule change might have on WHAG-TV.

The Commission's *NPRM* seeks comment on how the FCC should define a television station's must-carry zone pursuant to Section 73.3555(d)(3)(i), now that Arbitron Areas of Dominant Influence ("ADIs") no longer exist. *NPRM*, ¶¶ 2, 6. A change in the rule is needed soon because all television stations must make their choice whether to be considered a must-carry or retransmission consent signal for cable carriage purposes by October 1, 1996, for the three year period beginning January 1, 1997 through December 31, 1999. See 47 C.F.R. §76.64(f)(2).

The Commission suggests several alternative must-carry zones to the now-defunct ADIs:

1. Substitute Nielsen Designated Marketing Areas ("DMAs") for ADIs;
2. Retain the 1991-92 ADIs, modified through the Petition For Special Relief Process (47 U.S.C. § 614(h)); or
3. Retain the 1991-92 ADIs for the next three year cycle (1997-1999), and then switch to Nielsen DMAs thereafter.

NPRM at ¶ 6.

As discussed more fully below, the Commission carefully should consider the impact of any change in must-carry zones, since ultimately such changes could lead to the loss of key local service to television viewers, especially those served by outlying stations such as Great Trails'

WHAG-TV. Indeed, the Commission raised this very issue in the *NPRM*, and discussed the very case of WHAG-TV as an example of a case that deserves very close scrutiny,¹ since such a change would move WHAG-TV from a one county ADI (Washington County, MD), into the larger Washington, D.C. DMA, home of WRC-TV.

III. THE COMMISSION SHOULD CONTINUE TO RECOGNIZE COMMUNITIES ADDED TO A STATION'S MUST-CARRY ZONE PURSUANT TO THE SECTION 614(h) PROCESS

At the outset, Great Trails urges the FCC in the strongest terms possible to continue to recognize the modifications made to the 1993-96 must-carry zones which have been made pursuant to the Section 614(h) Petition For Special Relief process. These individually crafted zones, each the subject of intense FCC scrutiny and many months of processing effort, should not be jettisoned if the FCC chooses to adopt DMAs, or some other interim must-carry zones. The Section 614(h) procedure has provided the best way to fine tune what are by definition arbitrary zones based on a preponderance of viewing in a given county of all stations, and not on any analysis of the individual signal reach or programming delivered by any single station. Although it should seem obvious that the Commission should recognize specific adjudications over a more general rule, nonetheless, a strict reading of the FCC's proposals might be interpreted to suggest that if the FCC adopts DMAs as a station's must-carry zone, it would also reject must-carry zones previously crafted

¹ See *NPRM* at ¶ 6.

through the Section 614(h) process.² This approach is ill conceived and would violate the public interest.

For WHAG-TV, the Section 614(h) process probably saved the station from demise. This is because WHAG-TV's ADI consisted of a single county, Washington County, Maryland. Obviously, WHAG-TV's signal and coverage of local news and information programming extends far beyond this one county, and in many places WHAG-TV was not a must-carry signal where it could deliver a usable signal, whereas another NBC affiliate was a must-carry signal but could not deliver a signal to a cable system's headend.³

On July 1, 1993, WHAG-TV filed a Petition For Special Relief seeking to include within its must-carry zone cable systems in ten additional counties. On August 11, 1995, the FCC granted the Petition as to nine of the counties, concluding that WHAG-TV had demonstrated under the four-prong test that carriage on systems in these counties was in the public interest. *In re Great Trails Broadcasting Corp.*, 10 FCC Rcd 8629 (1995). In only one of the requested counties (Garrett County in far-western Maryland), did the Commission conclude that requiring cable systems to carry WHAG-TV would not be in the public interest, mainly

² If one looks closely at the language of paragraph six of the *NPRM*, the Commission first suggests that DMAs could be substituted for ADIs. It then goes on to suggest that it could continue to use ADIs, "subject to individual review and refinement through the Section 614(h) process." Nowhere, however, does the Commission explicitly state that a switch to DMAs also would incorporate must-carry zones previously modified by the Section 614(h) process.

³ The pre-*Quincy* must-carry zones, based partially on arbitrary 35 mile zones, did not suffer from the "single-county outlying station" problem. WHAG-TV's old 35 mile zone included most of the communities added through the Section 614(h) process, and was based on the idea that generally a station's signal could be viewed 35 miles from its city of license. An economic-based market, such as an ADI or DMA, however, introduce competitive elements in determining a station's market, and for many stations such as WHAG-TV, the audience drawing power of multiple large-market stations added together result in small or non-existent macroeconomic markets.

because WHAG-TV did not deliver a predicted Grade B contour to a majority of this remote rural county. *Id.* at 8634.

For the Commission to now wipe away those specific findings of public interest because a commercial vendor chose to get out of the business of designating markets is patently unfair. Indeed, not recognizing previously modified must-carry zones would reduce the Section 614(h) process to a nullity. If a station is required to re-justify itself under the four prong test of Section 614 every three years in a process that can take up to three years to conclude,⁴ then the process will become a vicious cycle that never is resolved, and will increasingly drain FCC resources.

Great Trails therefore strongly urges the FCC to explicitly state that it will continue to recognize previously defined must-carry zones which were based on ADIs, but modified by Commission order pursuant to Section 614(h). The Commission should further conclude that any party seeking to further modify a modified must-carry zone would have to present compelling evidence to overturn the prior Commission decision, and that the Commission would not conduct a *de novo* review of such situations.⁵ Such a policy will lead to more stability in must-carry zones, which ultimately inures to the benefit of all parties involved, television stations, cable systems, and most important, television viewers, as confusion is reduced.

⁴ Indeed, undersigned counsel still has a number of Section 614(h) Petitions filed in 1993 that have yet to receive an initial decision from the Commission.

⁵ See *United Video v. FCC*, 890 F.2d 1173, 1182 (D.C. Cir. 1989)(reversal in policy must be supported by a thorough review of the record and changes which have occurred supporting such a change); see also *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir., 1987)(in reversing itself, the Commission must "supply a reasoned analysis indicating that its prior policy and standards are being deliberately changed and not casually ignored.")

IV. THE COMMISSION SHOULD RETAIN THE "CLOSEST AFFILIATE" RULE

As a second critical point, Great Trails urges the Commission to continue the "closest affiliate" rule. 47 C.F.R. § 76.56(b)(5). That rule requires that a cable system carry the closest must-carry affiliate in the market before it can carry a more distant affiliate. This rule should do much to mitigate some of the damage should the FCC decide to switch over to a DMA-based must-carry zone. In WHAG-TV's situation, switching over to a DMA-based must-carry zone (as previously modified pursuant to Section 614(h)), would not have a significant impact if the "closest affiliate" rule is retained. WHAG-TV would become a must-carry signal throughout all of the Washington, D.C. DMA where it could deliver a usable signal.⁶ Thus, there would be two NBC affiliates in the Washington, D.C. DMA. Section 76.56(b)(5), however, specifies that a cable system need not carry more than one affiliate of the same network. Given the relative size and economic power of WHAG-TV and WRC-TV, absent the "closest affiliate" rule, there could be instances where a cable system chose to carry WRC-TV, and not WHAG-TV, even though WHAG-TV might be much closer geographically.⁷

The "closest affiliate" rule has a definite public interest benefit. By forcing cable systems to carry the closest geographic affiliate, the Commission is maximizing the potential for cable subscribers to receive local news and other information programming of specific interest to them. Additionally, such assured carriage allows smaller outlying stations, such as WHAG-TV, to expend the significant resources required

⁶ See 47 C.F.R. Sec. 76.55(c)(3) (in order to qualify as a must-carry signal, a station must deliver a usable signal to the cable system's headend).

⁷ Indeed, on almost every cable system carrying WHAG-TV, WRC-TV is also carried.

to produce local news and public affairs programming.⁸ Great Trails therefore urges the Commission to reaffirm its commitment to the "closest affiliate" rule.

**V. THE COMMISSION SHOULD RETAIN THE
EXISTING MARKET DEFINITIONS FOR THE 1996
ELECTION PERIOD AND SWITCH TO A NIELSEN
BASED STANDARD THEREAFTER**

On balance, Great Trails supports the third option posited by the Commission in the *NPRM* of continuing to use the existing must-carry zones for the 1996 election period and switching thereafter to Nielsen DMAs. There are several compelling reasons to adopt this approach. First, having only been through a single cycle of election and negotiations, both television stations and cable systems are still relatively new to the process. Changing market definitions would add another level of complexity to negotiations, which as the FCC may recall, were difficult and protracted three years ago because of the newness of the rules.

Second, cable systems have also had to cope with changing must-carry zones engendered by Section 614(h) petitions during the last three years. To add further questions now, including the questions posed above as to what happens to modified zones if DMAs are adopted as the

⁸ WHAG-TV airs the following local news programming: 6:30-7:00 a.m.; five minute inserts at 7:25 a.m., 7:55 a.m., 8:25 a.m. and 9:55 a.m. weekdays; 5:30-6:00 p.m., 6:00-6:30 p.m.; and 11:00-11:35 p.m. In addition, WHAG-TV airs "Today In The Valley," a five minute insert every weekday at 8:55 a.m. in which it provides local non-profit organizations the chance to publicize themselves and upcoming community events. WHAG-TV also airs "Viewpoint 25" on Sunday mornings from 10:00-10:30 a.m., right after NBC's "Meet The Press" as a local public affairs program focusing on issues of critical importance to the communities served by WHAG-TV.

standard for must-carry zones, will further complicate the upcoming negotiations process.

Finally, changing to DMAs now would start a whole new cycle of Section 614(h) petitions as television stations attempt to regain counties lost between the different methodologies of Arbitron and Nielsen. This would add still further confusion to the upcoming negotiations between cable systems and television stations for must-carry/retransmission consent.

Allowing the existing designations to extend three additional years will lend a degree of stability to the process. In the past, the FCC has not hesitated to "freeze" such market designations. For example, Section 76.53 still lists the top 100 television markets as they existed 25 years ago, even though the order of the top 100 markets is significantly different today from what existed in 1970. Similarly, the infamous "Appendix B" designation of stations which are significantly viewed pursuant to Section 76.54 is based on a study conducted of the viewership numbers of all television stations in 1970.

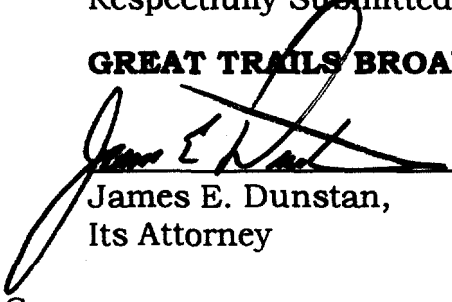
Switching over to Nielsen DMAs in three years, moreover, avoids the "ice age" problem of never being able to change these definitions which has plagued the cable rules listed above. By putting all television stations and cable systems on notice now that DMAs will be used three years in the future, the FCC can help foster a graceful transition which should not unduly harm any party.

VI. CONCLUSION

Based on the above, Great Trails urges the FCC to consider carefully any changes in this area. Any change must be accompanied by an explicit declaration that the Commission will continue to apply the must-carry zones defined pursuant to the Section 614(h) process, and will continue to apply the "closest affiliate" rule. Ultimately, the FCC will accomplish the smoothest transition by applying the existing market definitions for the upcoming three year cycle, and change over to DMAs beginning in the year 2000.

Respectfully Submitted,

GREAT TRAILS BROADCASTING CORP.



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